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Before The

FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

TO: The Commission

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION OPPOSITION TO U S WEST'S REQUEST FOR STAY

The Competitive Telecommunications Association ("CompTel"), by its attorneys and pursuant to 47 C.F.R. § 1.43, hereby opposes the "Request for Stay Pending Judicial Review" ("Request") filed by U S West, Inc. ("U S West") on September 6, 1996, seeking a stay of the Commission's First Report and Order in the above-captioned docket.[1]

U S West cites with approval and supports the motion for stay filed jointly by GTE Service Corporation and Southern New England Telephone Company ("GTE/SNET") on August 28, 1996. In addition, U S West raises two arguments: first, it reiterates the argument that the default proxy rates adopted as an interim measure by the Commission are unreasonable because they will "remove any incentive for a requesting carrier to negotiate with a LEC concerning prices;" and, second, U S West argues that the Commission's "most favored nation" rules, which

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1 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996) ("First Report"). As was true of the GTE/SNET motion, U S West's request is facially overbroad because it seeks a stay of the First Report in its entirety even though U S West only challenges selected rules and policies adopted by the Commission. See McSurely v. McClellan, 697 F.2d 309, 314 (D.C. Cir. 1982).

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allow interconnectors to elect to take specific provisions from agreements negotiated by other parties, would unreasonably restrict its bargaining ability. See Request at 11 & 15.

On September 4, 1996, CompTel filed with the Commission an opposition to the GTE/SNET motion for stay which fully addresses several arguments raised by U S West. Rather than repeat those arguments here, CompTel appends that opposition and adopts the arguments from that pleading herein by reference. With respect to the two arguments raised by U S West, CompTel submits that U S West has not satisfied the well-established standards for granting a stay.

I. U S WEST'S APPEAL IS UNLIKELY TO BE SUCCESSFUL

U S West's challenge to the Commission's default proxy rates is based upon the unsupported assertion that proxy rates will unlawfully restrict its ability to negotiate agreements pursuant to Sections 251-252 of the Telecommunications Act of 1996 ("1996 Act"). See Request at 11-12. As CompTel has previously shown, Section 251 gives the Commission express authority to adopt rules and policies to implement the requirement that rates for interconnection and network elements should be "just and reasonable." See CompTel Opposition at 3-7. The Commission's action will be subject to judicial deference under the well-established doctrine of Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842 (1984) ("Chevron").

Similarly, U S West fails to show that the Commission's "most favored nation" rules will not withstand judicial scrutiny. U S West argues that the general availability of individual interconnection terms will eliminate its ability to negotiate disparate terms for different carriers, and will allow interconnected parties to change the terms of existing contracts if preferable terms later become available. See Request at 6-8. U S West disputes that Section 252(i) of the 1996 Act entails the Commission's "most favored nation" policy. See Request at 6 n.1.

Neither argument constitutes a ground for reversal of the First Report. The Commission's "most favored nation" rules work to equalize the disparate bargaining positions of

U S West and requesting carriers. Without such a provision, U S West could use its superior position to impose unreasonable terms on selected competitors. The Commission's action is fully consistent with Carson v. American Brands, Inc., 450 U.S. 79 (1981), in that it promotes fair and effective bargaining between U S West and its competitors. See CompTel Opposition at 7.

Moreover, as the Commission exhaustively documents in the First Report (at paras. 1309-23), the "most favored nation" policy is consistent with -- indeed, it is mandated by -- the plain language of Section 252(i) and the legislative history of the 1996 Act. That provision provides in unequivocal terms that U S West must "make available any interconnection, service, or network element provided under an agreement approved under this section . . . to any other requesting telecommunications carrier upon the same terms and conditions." U S West's attempt to narrow Section 252(i) by making it applicable only to complete agreements, and only to carriers who have not already entered into an agreement with U S West, is an impermissible post hoc rewriting of the provision. Under Chevron, the Commission's "most favored nation" policy will likely be sustained upon judicial review.

II. U S WEST WILL NOT SUFFER IRREPARABLE HARM

U S West argues that the Commission's interim proxy rates and "most favored nation" policies would cause irreparable harm by denying it the ability to bargain over interconnection rates and terms. Listing a number of pending requests for negotiation and arbitration, U S West argues that interconnection agreements under the rules of the First Report will generate network design decisions that may be costly to alter if the Commission's rules are reversed on appeal. See Request at 15.

In its previous Opposition, CompTel demonstrated that incumbent carriers will not incur irreparable harm should the First Report take effect as scheduled. By ensuring that requesting carriers can negotiate with incumbent carriers on a more level playing field, the Commission's rules make it possible for the first time for new entrants to negotiate reasonable interconnection arrangements with dominant carriers like U S West. In any event, nothing would prevent U S West from seeking to renegotiate its agreements if portions of the First Report are overturned on appeal. See CompTel Opposition at 7-8. U S West's concern about the possible cost of renegotiating agreements cannot justify delaying competitive new entry by staying the Commission's rules and effectively staying the 1996 Act.

U S West's argument that default proxies remove the incentive for a new entrant to negotiate higher rates must be taken with a grain of salt. It was to ensure that requesting carriers could receive reasonable rates prior to implementation of the TELRIC methodology that the Commission adopted the default proxies. Further, the Commission made clear that the default proxies are merely interim measures until the incumbent carrier can establish rates based upon the requisite methodology. If U S West does not like the interim default proxy rates, it can proffer rates based upon cost studies conducted according to the prescribed methodology. In light of the above, U S West's assertion of irreparable harm must be rejected.

III. U S WEST HAS NOT SHOWN THAT THE BALANCE OF HARMS OR PUBLIC INTEREST CONSIDERATIONS FAVOR A STAY

U S West makes the summary and unsupported assertion that the Commission's interconnection rules will hinder the development of interconnection-based competition, and that if a stay is granted, "private negotiation and arbitration under the Act will continue unfettered." (Request at 16) This is indeed an ironic statement from a company who has not had a single negotiated agreement approved by a state regulatory body, and that by its own admission has 33 parties seeking compulsory arbitration. As did the GTE/SNET motion, U S West's request promotes the fiction that negotiations between incumbent carriers and new entrants which are "unfettered" by Commission rules will lead to the development of local competition for the first time. In fact, the reason why these carriers are desperate to conduct "unfettered" negotiations is that such negotiations are inherently unlikely to lead to meaningful local competition anytime soon. As CompTel demonstrated in its Opposition, a stay of the First Report would eliminate the only significant leverage that competitive carriers have to negotiate reasonable interconnection agreements and thereby forestall such agreements. <u>See</u> CompTel Opposition at 9-10. For this reason, the public interest demands rejection of U S West's request for a stay.

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September 13, 1996

ATTACHMENT

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COMPETITIVE TELECOMMUNICATIONS ASSOCIATION OPPOSITION TO MOTION FOR STAY

The Competitive Telecommunications Association ("CompTel"), by its attorneys and pursuant to 47 C.F.R. § 1.43, hereby opposes the joint motion filed by GTE Service Corporation ("GTE") and Southern New England Telephone Company ("SNET") on August 28, 1996 for a stay of the First Report and Order on August 8, 1996 in the above-captioned docket.[1]

The Commission should dismiss the motion summarily. GTE and SNET are not the only parties who object to portions of the First Report. For its part, CompTel intends to file a petition for reconsideration raising issues where, in CompTel's view, the Commission misread the statute or adopted unreasonable rules and policies to implement the statute. From a market and economic perspective, CompTel's issues are no less consequential to its members than are the issues raised in the joint motion to GTE and SNET. Yet CompTel has not filed a motion for

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1 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996) ("First Report"). By seeking a stay of the First Report in its entirety, while not challenging all of the rules adopted by the Commission, the joint motion is facially overbroad.

stay, nor does it support a stay, because the First Report supplies the only workable framework within which the industry can begin to move forward now to develop local competition. The Commission should use the reconsideration process to modify the regulatory regime it adopted in the First Report; it should not put the industry and the 1996 Act on indefinite hold while parties litigate at the Court of Appeals.

At bottom, GTE's and SNET's claim that they seek a stay in order to ensure a fully competitive local telecommunications market pursuant to the 1996 Act (e.g., Motion at 40) cannot be taken seriously. Neither movant has any interest whatsoever in ensuring such a result. Unlike the Bell companies, GTE and SNET are not precluded from entering the interLATA market in their own regions until local competition develops. As a result, both movants have a clear, undivided economic interest in defeating the goal of Congress and the Commission to create meaningful competitive inroads into their respective local monopolies. Staying the new rules would achieve that result by creating chaos in state arbitration proceedings at a critical juncture and forcing new entrants to delay their business plans for local entry for many months.

Under established standards, GTE and SNET are not entitled to a stay unless they meet the burden of showing (i) a likelihood of success on the merits; (ii) irreparable injury absent a stay; (iii) the absence of harm to others from granting a stay; and (iv) that the public interest favors a stay. CompTel shows below that the joint motion fails to satisfy even one of these standards.

I. GTE AND SNET ARE NOT LIKELY TO PREVAIL ON THE MERITS

GTE and SNET have not raised even one issue that was not exhaustively addressed by commenting parties on the record and by the Commission in the First Report after months of intensive consideration. While this does not guarantee that the First Report is error-free, nor remove the need for the Commission to refine its regulatory regime on reconsideration, the joint motion provides no independent basis for the Commission to assume that the First Report is likely to be overturned upon judicial review.

Moreover, the Commission is particularly likely to prevail on the issues raised by GTE and SNET. The movants challenge the Commission's authority to adopt the TELRIC-plus methodology or indeed any pricing rules at all. However, the Commission expressly relied upon the plain language of the 1996 Act, and its interpretation and implementation of the 1996 Act on these issues are subject to deference by appellate courts. In determining whether the First Report is consistent with the 1996 Act, a Court of Appeals will undertake the two-pronged test under Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842 (1984) ("Chevron"). That test accords primacy to the plain language of the statute and, to the extent the statutory language may be considered subject to more than one interpretation, the Commission may adopt any permissible construction. The aspects of the First Report challenged by GTE and SNET will be upheld under the Chevron analysis.

The Commission's authority to adopt pricing rules stems from Section 251(d)(1), which directs the Commission to "complete all actions necessary to establish regulations to implement the requirements of [Section 251]." One such requirement is that rates for interconnection and network elements be "just and reasonable," thereby authorizing the

Commission to adopt pricing rules to ensure "just and reasonable" rates. By adopting pricing rules, the Commission did not infringe upon state jurisdiction. Congress directed state commissions, when resolving arbitrations under Section 252(c)(1), to ensure full compliance with the Commission's pricing rules under Section 251. Further, the Commission left undisturbed the fundamental responsibility of state commissions to apply the relevant pricing rules in particular arbitrations by deriving or approving specific rates. The Commission's exercise of its authority to establish pricing rules is fully consistent with the statutory language and the responsibility of state commissions over rates in arbitration proceedings.

The joint movants' assertion that Section 2(b) of the Communications Act of 1934 repudiates the Commission's pricing rules (Motion at 9-12) also does not withstand scrutiny. If it were possible to construe the 1996 Act compatibly with the division of jurisdiction into mutually-exclusive interstate and intrastate spheres under Section 2(b), GTE and SNET might have a colorable basis for seeking a stay. But it is not possible to do so. The Commission showed through painstaking analysis in the First Report (at paras. 83-93) that GTE's and SNET's reading of Section 2(b) would eviscerate numerous provisions in the 1996 Act and effectively nullify that statute. Where, as here, the Commission's choice to preempt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the Court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[2] Because the

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2 New York v. F.C.C., 486 U.S. 57, 57 (1988) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

Commission correctly interprets the language and provisions of the 1996 Act to establish a new system of parallel jurisdiction, its effort to reconcile the 1996 Act with Section 2(b) is subject to deference under Chevron.

The plain language of the statute also entails the TELRIC-plus methodology adopted by the Commission. Section 252(d)(1)(A) pegs "just and reasonable" rates to the "costs" of an incumbent local exchange carrier ("LEC"). In arguing that Congress meant carriers' actual, embedded, historical costs (Motion at 12-13), GTE and SNET completely ignore Congress' admonition that costs should be determined without reference to "rate-of-return or other rate-based proceeding[s]." 47 U.S.C. § 252(d)(1). The statutory language compels the Commission's TELRIC-plus methodology, and repudiates GTE's and SNET's self-serving interpretation.

The Commission also considered, and expressly rejected, GTE's and SNET's argument that the TELRIC-plus methodology accomplishes a taking without just compensation in violation of the Fifth Amendment. As the courts and the Commission have held many times, the determination of whether a rate is confiscatory depends on whether the rates themselves are just and reasonable, not on what methodology is used to derive those rates.[3] By definition, TELRIC-plus rates ensure that incumbent LECs will be fully compensated for providing interconnection and network elements to requesting carriers. The Commission's holding (at para. 736) -- "the mere fact that an incumbent LEC may not be able to set rates that will allow it

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3 Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602-03 (1944).

to recover a particular cost incurred in establishing its regulated network does not, in and of itself, result in confiscation" -- is well-reasoned and supported by case law. In any event, the joint movants' takings claim is premature. State commissions have not yet derived specific TELRIC-plus rates for GTE or SNET, and this Commission has not concluded its access reform and universal service proceedings to determine whether incumbent LECs are entitled to recover any additional revenues beyond those they impose upon new entrants through TELRIC-plus rates. Because the amount of compensation the incumbent LECs will receive is not yet known with certainty, the takings claim is premature.

Further, the joint movants' challenge to the TELRIC-plus methodology is inconsistent with positions GTE has taken in other proceedings before state regulators and the Commission. In California, GTE prepared total service long run incremental cost studies to support its rates, admitting that "[n]on-forward looking expense categories . . . are not appropriate for determining the Company's forward-looking costs and are therefore excluded."[4] Similarly, GTE has priced interstate services on an incremental cost basis in the past. For example, GTE set its switched transport rates on an average variable cost basis, which does not even recover the joint and common costs the Commission has incorporated into the TELRIC-plus standard. GTE defended that approach by arguing that "it is an accepted economic standard to view incremental costs on a forward looking basis."[5] GTE asserted that consideration of

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4 See Open Access and Network Architecture Development, California Public Utility Commission, Decision No. 96-08-021, Rulemaking No. 93-04-003, Aug. 2, 1996, at 107.

5 GTE Telephone Operation Companies, 10 FCC Rcd 1573, 1573 (1994).

historical cost data would "suggest[] embedded cost studies and abandoned methodologies such as fully distributed cost" that are an unreasonable basis for setting rates.[6] GTE's past and continuing support of forward-looking incremental cost methodologies for establishing rates repudiates the joint movants' opposition to the TELRIC-plus standard.

Although GTE and SNET have challenged numerous other aspects of the Commission's new rules and policies, the Commission need not resolve those challenges to deny the joint motion. The movants seek a stay of the Commission's rules in their entirety or, barring that, the Commission's pricing rules. Once the Commission determines that the joint movants are not likely to prevail upon their challenge to the Commission's pricing rules, the Commission should reject the motion forthwith.

II. GTE AND SNET HAVE NOT SHOWN THAT THEY WOULD SUFFER IRREPARABLE HARM ABSENT GRANT OF A STAY

GTE and SNET claim that the Commission's regulatory regime will result in irreparable harm by reducing the bargaining power of incumbent LECs, and by setting rates so low that they are deprived of revenues, customers and goodwill. Motion at 25-35. Neither argument establishes irreparable harm.

In establishing national standards for agreements under Section 251(c), the Commission acted to counter the superior negotiating position that all LECs occupy as a result of their position as dominant local carriers. This action was predicated on the Commission's

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6 Id. at 1573.

experience in overseeing physical and virtual collocation arrangements between LECs and competitive carriers. (First Report at ¶ 558.) While GTE and SNET may prefer to maintain their current advantage over competitors in negotiating interconnection arrangements, losing that advantage does not constitute irreparable harm. The Carson and Transit Union cases cited by GTE and SNET regarding lost bargaining opportunities (Motion at 29) fully support the Commission's action. By establishing uniform rules within which parties must negotiate, the Commission for the first time has taken steps to ensure that competitive carriers can negotiate with dominant LECs on something resembling a level playing field.

It is specious for the movants to argue that once agreements are established pursuant to the Commission's rules, it will be impossible for parties to "return to a blank slate" should GTE and SNET prevail upon appeal. Motion at 25-30. It is not immediately apparent why incumbent LECs could not insist upon revising agreements in light of subsequent changes to the FCC's rules through reconsideration or appeals. Any party could reasonably seek to insert a provision into an agreement ensuring that revisions occur in light of pertinent regulatory and judicial decisions. When the shoe is on the other foot, GTE and SNET readily acknowledge that nothing will be set in concrete after the current arbitrations are decided. GTE's and SNET's admission that competitive new entrants can subsequently modify their agreements should GTE and SNET lose on appeal (Motion at 34-35) is flatly inconsistent with their position that incumbent LECs could not themselves obtain such revisions if they prevail on appeal without a stay.

GTE's and SNET's arguments that the Commission's pricing rules will impose irreparable revenue losses also lack merit. State commissions have not yet established TELRIC-plus rates for GTE and SNET, and the Commission has not yet finished its access reform and universal service proceedings in which it will determine whether incumbent LECs are entitled to recover revenues from other carriers beyond those obtained through TELRIC-plus rates. Further, GTE and SNET ignore the FCC's interim plan whereby carriers who purchase unbundled local switching will pay 100% of the carrier common line charge and 75% of the transport interconnection charge during the transition to access and universal service reform. GTE and SNET cannot even show that they will suffer any economic losses at all, much less "irreparable" losses, from the First Report.

GTE's and SNET's complaint that they will lose customers and revenues as a result of the First Report is not justiciable. The 1996 Act intended to eliminate the incumbent LECs' monopoly on local services by facilitating entry through interconnection, network elements, and resale. The First Report correctly implemented the 1996 Act, and the result, if all goes as Congress planned, is that incumbent LECs necessarily will lose revenues and customers as a result of the increased competition stimulated by the statute. The law is well established that losses due to lawful competition cannot constitute irreparable harm.[7]

III. GRANTING A STAY WOULD HARM THE INTERESTS OF THIRD PARTIES AND DISSERVE THE PUBLIC INTEREST

Contrary to GTE's and SNET's argument, granting the requested stay would cause irreparable harm to competitive carriers by effectively preventing them from entering the

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7 E.g., Central and Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 308 (D.C. Cir. 1985).

local market on reasonable terms until after judicial review has concluded, which may be many months from now. Staying the Commission's rules in their entirety, or the Commission's pricing rules specifically, would be the equivalent of staying local entry under the 1996 Act. Without the Commission's regulatory framework, incumbent LECs would not, as GTE and SNET suggest, negotiate in good faith to obtain voluntary agreements. As the Commission recognized in the First Report (at para. 10), GTE and SNET have no incentive whatsoever to negotiate any favorable rates, terms and conditions that are not mandated by the Commission or state commissions. Competitive carriers would enter the market on incumbent LECs' terms or not at all, without any functional difference between the two. If a stay of the rules is granted, LECs will continue to exert their monopoly power to further delay true local competition in direct contradiction to Congress' intention.

Conclusion

For the reasons discussed above, CompTel respectfully requests that the Commission deny the motion for stay.

Respectfully submitted,

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September 4, 1996

CERTIFICATE OF SERVICE

I, Regina Alston, hereby certify that I have caused a copy of the foregoing "Competitive Telecommunications Association Opposition to U S West's Request for Stay" to be served on this 13th day of September, 1996, by U.S. mail, first class postage, upon the following:

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